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10/611,765	07/01/2003	Leonard R. Sokola SR.	SOK-101US	2171
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RATNERPRESTIA P.O. BOX 1596 WILMINGTON, DE 19899			CASTELLANO, STEPHEN J	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/611,765
Filing Date: July 01, 2003
Appellant(s): SOKOLA, LEONARD R.

MAILED
OCT 20 2006
GROUP 3700

Frank P. Tice
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 14, 2006 appealing from the Office action mailed April 20, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Appeal No. 2006-0288 decided on January 4, 2006.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

The withdrawn claims are also pending and have not been abandoned.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,296,488	BRENKUS et al.	10-2001
D443,176	STRANDBERG	06-2001
D373,930	GRUNEISEN, III	09-1996
4,863,033	Buj	09-1989
D241,398	Frucher	09-1976

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 1-5, 7, 10-13, 16, 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buj in view of Strandberg, Frucher and Brenkus et al. (Brenkus).

Buj discloses a dinnerware article (plate and eating utensils) adapted to receive food, comprising: a shallow container (plate or dish), a raised likeness of a creature (statuette of dolphin 2 as well as the statuettes of a dolphin 5, 8 on the handle of the spoon 3 and fork 6, respectively) affixed to the upper surface. Buj lacks an adequate showing of a graphical diet reminder. Strandberg teaches a graphical diet reminder consisting of (1) the words "NUTRITION PLATE" and "HEALTHY EATERS," and (2) a centrally located food triangle/pyramid with graphical representations of different food groups (breads, grains and

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starches in the bottom row, fruits and vegetables in the middle row, and eggs, fish and meat in the top portion). Strandberg's disclosure is particularly directed to infants, toddlers and young children because of the animated representation of the food items. Frucher teaches a Passover Seder plate having a graphical diet reminder (branches of grapes as well as various words representing a Seder diet, i.e., bitter herbs, shankbone, parsley, lettuce, charoses and egg). Brenkus teaches a diet method and apparatus comprising a compartmented plate and meal cards representing the various sized portions and which list the various food choices and defines a graphical diet reminder of meal cards used on a compartmented diet plate. It would have been obvious to add either of the graphical diet reminder teachings of Sandberg, Frucher or Brenkus to Buj's dinnerware to provide education about nutrition when combining with Sandberg's nutrition plate, to provide education about religion as well as good nutrition when combining with Frucher's Seder plate and to provide education as well as proper food portions when combining with Brenkus.

Re claim 16, Buj discloses the invention except for the resemblance of a pig. It would have been obvious to modify the type of creature resembled (such as a pig) as a matter of design choice and as a matter of little criticality since the application teaches a wide variety of different animals.

Claims 17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buj in view of Strandberg, Frucher and Brenkus and further in view of Gruneisen, III (Gruneisen).

The combination discloses the invention except for the likeness being hollow. Gruneisen teaches a container that resembles a basketball that is hollow and has a bottom and a removable

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top. It would have been obvious to modify the likeness of the dolphin to be hollow and have a bottom and a removable top as motivated by the reduced weight and access to a separate compartment that can provide storage adjacent to the shallow container.

(10) Response to Argument

Rejection of Buj in view of Strandberg, Frucher and Brenkus

Appellants argument is based on the plate of Buj being very different from the plates of Strandberg, Frucher and Brenkus because the plate of Buj is intended for children who can't "eat on their own" and that Buj encourages children to eat on their own while the Strandberg, Frucher and Brenkus plates are intended for a much older child, one capable of reading and grasping the advanced concepts of religious symbolism, nutrition and food portion control. The examiner can't find any reference in Buj to the age of the child. It seems improper for applicant to assume that the Buj plate is intended and can only be used by infants, toddlers and very young children when much older children, even teenagers and young adults who have an affection for animals may be encouraged to eat on their own with the Buj plate. The examiner believes that Buj never intended to limit use to a specific age, much less a very young age. Children can begin reading as young as four years old, most children begin reading at 5-6 years old. It is believed that children who begin to read can also begin to grasp the concepts of religious symbolism, nutrition and food portion control. These concepts can be verbally conveyed to children too young to read through speech and visually conveyed through graphical symbols, including animated characters.

Even if appellant was correct in the assumption that Buj is intended for only very young children, there would still be adequate reason to combine the graphical diet reminders of

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Strandberg, Frucher and Brenkus because parents and guardians of children could read and benefit from the concepts of religious symbolism, nutrition and food portion control. The reasoning for combining a graphical diet reminder with Buj's plate is similar to the reasoning of providing graphical or written instructions or warnings on any item for children too young to read, e.g., toys, cribs, playpens, car seats, highchairs, etc. The written instructions and warnings are for the parent or guardian to read and benefit the young child as well as the parent or guardian.

Re appellant's argument that Frucher relates to religious symbolism rather than a graphic diet reminder, if any of the Seder food items of bitter herbs, shankbone, parsley, lettuce, charoses or egg are actually eaten, then this defines the Passover or Seder diet.

Re appellant's argument that the cards of Brenkus with the graphical diet reminder are situated beneath the upper surface, it would have been known from Frucher and Strandberg that the information could be embossed or imprinted on the upper surface rather than situated on a card beneath the upper surface.

Re claim 16 and appellant's argument about the likeness resembling a pig, appellant contradicts himself in stating "the application doesn't teach a 'wide variety of animals,'" (page 13, line 9 of brief) when applicant mentions, a walrus, a hippopotamus, a whale and a pig (a variety of animals) (page 13, lines 13-14 of brief).

Rejection of Buj in view of Strandberg, Frucher and Brenkus and further in view of Gruneisen

Gruneisen is relied on for its teaching of making a simulated likeness or statuette hollow with a removable top portion. Gruneisen is not being relied upon to display a likeness of a creature as Buj already provides the dolphin as the likeness of a creature. The likeness of the dolphin is modified by Gruneisen to be hollow with a removable top portion.

Evidence Appendix

Appellant states that he doesn't rely upon evidence other than that related in the foregoing sections of this appeal. Since no reference to case law is made by appellant, there is no evidence which appellant relies upon in his arguments.

(11) Related Proceeding(s) Appendix

Copies of the court or Board decision(s) identified in the Related Appeals and Interferences section of this examiner's answer are provided herein.

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For the above reasons, it is believed that the rejections should be sustained.

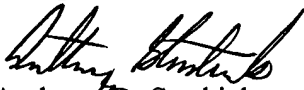
Respectfully submitted,


Stephen Castellano

Stephen Castellano
Primary Examiner

Conferees:


Nathan J. Newhouse


Anthony D. Stashick

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

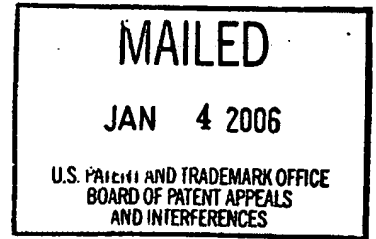
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEONARD R. SOKOLA, SR.

Appeal No. 2006-0288
Application 10/611,765

ON BRIEF



Before PAK, WARREN and TIMM, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

Decision on Appeal and Opinion

We have carefully considered the record in this appeal under 35 U.S.C. § 134, and based on our review, find that we cannot sustain the grounds of rejection advanced on appeal:

claims 1 through 5, 7 and 10 through 12 stand rejected under 35 U.S.C. § 102(b) as anticipated by Buj (answer, page 4);

claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj (answer, page 4);

claims 17 and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj in view of Gruneisen (answer, page 4);

claims 13, 19 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj in view of Brownell (answer, pages 4-5); and

claims 1, 10, 13, 19 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brownell in view of Buj and Gruneisen (answer, page 5).^{1,2}

We refer to the answer and to the brief for a complete exposition of the positions advanced by the examiner and appellant.

It is well settled that in order for the examiner to establish a *prima facie* case of anticipation, each and every element of the claimed invention, arranged as required by the claim, must be found in a single prior art reference, either expressly or under the principles of inherency. *See generally, In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997); *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 677-78, 7 USPQ 1315, 1317 (Fed. Cir. 1988); *Lindemann Maschinenfabrik GMBH v. Am. Hoist and Derrick*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

It is also well settled that in order to establish a *prima facie* case of obviousness under § 103(a), the examiner must show that some objective teaching, suggestion or motivation in the applied prior art taken as a whole and/or knowledge generally available to one of ordinary skill in this art would have led that person to the claimed invention as a whole, including each and every limitation of the claims arranged as required by the claims, without recourse to the teachings in appellant's disclosure. *See generally, In re Rouffet*, 149 F.3d 1350, 1358, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998); *Pro-Mold and Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1629-30 (Fed. Cir. 1996); *B.F. Goodrich Co. v. Aircraft Braking Sys. Corp.*, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); *In re Fine*, 837 F.2d 1071, 1074-76, 5 USPQ2d 1596, 1598-1600 (Fed. Cir. 1988); *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

¹ See the appendix to the brief filed June 9, 2005. Claims 6, 8, 9, 14, 15 and 21 through 23 have been withdrawn from consideration by the examiner under 37 CFR § 1.142(b). Claims 1 through 23 are all of the claims in the application.

² Appellant presents arguments respecting the objection to the amendments to the specification and to the drawings set forth in the final rejection mailed December 8, 2004 (brief, pages 3-4 and 6-9). As the examiner points out (answer, page 3), these matters are petitionable and thus, not reviewed on appeal. *See Manual of Patent Examining Procedure* §§ 1002.02(c) and 1201 (8th ed., Rev. 2, May 2004; 8th ed., Rev. 3, August 2005).

The principal issue in this appeal involves the limitation of appealed independent claim 1, on which all other appealed claims depend, specifying “a graphical diet reminder on the upper surface” of “a shallow container.” We determine from the specification (e.g., pages 1-2 and 5-6) that the terms in the subject language in context would have their ordinary meaning to one of ordinary skill in this art, and thus, the shallow container can be a plate having on its upper surface any reminder with respect to one’s diet that is communicated in graphical form. *See, e.g., In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004); *In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

We agree with appellants that the record before us does not contain evidence supporting the finding of the examiner that the spoon 3 and fork 6, each having a toy figure, as positioned on plate 1 of Buj constitute a disclosure which meets the subject limitation of claim 1. Indeed, we find as a matter of fact that Buj discloses no more than that the spoon and fork serve the function of influencing a child to take the food from the plate and bring it to his/her mouth (e.g., col. 1, ll. 51-55, col. 1, l. 64, to col. 2, l. 1, col. 2, ll. 24-31 and 56-68, and col. 3, l. 26, to col. 4, l. 2). Accordingly, in the absence of an explanation or evidence adduced by the examiner establishing that the spoon and fork on the plate of Buj in fact meet the subject claim limitation, we find that the examiner has not established that Buj *prima facie* in fact anticipates appealed claims 1 through 5, 7 and 10 through 12, within the meaning of § 102(b). For the same reason, Buj fails to supply the factual foundation for a *prima facie* case of obviousness under § 103(a) of appealed claims 16 through 18, which also contain the subject limitation, and the combination thereof with Grunesien does not cure the deficiency.

With respect to the grounds of rejection of appealed claims 1, 10, 13 and 17 through 20 under § 103(a) which involve the combined teachings of Buj and Brownell, like appellant, we cannot agree with the examiner’s findings and conclusions that “Brownell teaches a food pyramid shaped plate” since “Brownell shows a pictorial representation of a food pyramid (see ‘OTHER PUBLICATIONS’ section of patent cover),” which listing of references includes “a food pyramid reference providing a connection between the triangular shape of the plate and the triangular shape of representations of the food pyramid,” and thus, that “Brownell is a pictorial

representation of a food pyramid, it is a graphical diet reminder, it is on the central section” (answer, pages 4-5 and 7-8). While the design of the compartmentalized plate disclosed by Brownell resembles a “pyramid,” there is no graphical or other communication on the plate *per se* to the effect that the same in fact represents any manner of “food guide pyramid,” and Brownell provides no such disclosure. The examiner has provided no other evidence or explanation establishing that the compartmentalized plate of Brownell would have been recognized as a graphical reminder of such pyramid.

Thus, in the absence of an explanation or evidence in the record establishing that the compartmentalized plate disclosed by Brownell would have reasonably suggested “a graphical diet reminder” to one of ordinary skill in this art, we find that even if this person would have combined the teachings of Buj and Brownell, the result would have been a compartmentalized plate with accompanying eating utensils wherein each piece has a toy figure thereon, which does not meet the subject limitation of the appealed claims. *See Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1050-54, 5 USPQ2d 1434, 1438-41 (Fed. Cir. 1988).

The examiner's decision is reversed.

Reversed


CHUNG E. PAK
Administrative Patent Judge


CHARLES F. WARREN
Administrative Patent Judge


CATHERINE TIMM
Administrative Patent Judge

BOARD OF PATENT APPEALS AND INTERFERENCES

Appeal No. 2006-0288
Application 10/611,765

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